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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

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No. 72-134

MRS. BILLIE McCLURE,

Petitioner,

v.

THE SALVATION ARMY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF THE NATIONAL ORGANIZATION FOR WOMEN AS AMICUS CURIAE IN SUPPORT

MARILYN HALL PATEL,
Mills Tower,
220 Bush Street,
San Francisco, California 94104.

Attorney for amicus curiae

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INDEX

	Page
Interest of Amicus Curiae	1
Opinions Below	2
Jurisdiction	2
Reasons for Granting the Writ	3
Statistics and Constitutional Provisions Involved	3
Questions Presented	5
Statement	5
Argument	7
Conclusion	17

AUTHORITIES

Aptheker v. *Secretary of State*, 378 U.S. 500 (1964) 7

Ashwander v. *Tennessee Valley Authority*, 297 U.S. 288 (1936) 5, 6, 7

Braunfeld v. *Brown*, 366 U.S. 599 (1961) 14

Crowell v. *Benson*, 285 U.S. 22 (1932) 7

Everson v. *Board of Education*, 330 U.S. 1 (1947) .. 17

Gallagher v. *Crown Kosher Super Market*, 366 U.S. 617 (1961) 14

Gonzalez v. *Roman Catholic Archbishop*, 280 U.S. 1 (1929) 12, 16

Jay v. *Boyd*, 351 U.S. 345 (1956) 7

Kedroff v. *St. Nicholas Cathedral*, 344 U.S. 94 (1952) 12

McGowan v. *Maryland*, 366 U.S. 420 (1961) 14

Pierce v. *Society of Sisters*, 268 U.S. 510 (1925) 14

Presbyterian Church in the United States v. *Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440 (1969) 11, 16

Prince v. *Commonwealth of Massachusetts*, 321 U.S. 158 (1944) 14

Reynolds v. *United States*, 98 U.S. 145 (1878) 14
Scales v. *United States*, 367 U.S. 211 (1960) 7
Shapiro v. *United States*, 335 U.S. 1 (1948) 10
Sherbert v. *Verner*, 374 U.S. 398 (1963) 12
Tilton v. *Richardson*, —— U.S. ——, 91 S. Ct. 2091 (1971) 16
United States v. *Sullivan*, 332 U.S. 689 (1948) 8
Wisconsin v. *Yoder*, —— U.S. ——, 92 S. Ct. 1526 (1972) 14

STATUTES

U.S. Const. Amendment I 4
Title VII, Civil Rights Act of 1964, 42 U.S.C. Sec. 2000e et seq.:
§702, 42 U.S.C. §2000e-1 .....3, 5, 6, 8
§703, 42 U.S.C. §2000e-2 .....4, 6
§704, 42 U.S.C. §2000e-3 4

OTHER AUTHORITIES:

110 Cong. Rec. at 12722 8
118 Cong. Rec. No. 11 at S928 et seq. and S2061. February 1, 1972 and February 17, 1972 .....9, 10
118 Cong. Rec. No. 35 at H1862, March 8, 1972 ... 10

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INTEREST OF AMICUS CURIAE

The National Organization for Women (NOW) is a non-profit organization of women and men with chapters throughout the United States. Its purposes are to bring women into the full and equal partnership with men in all aspects of social, economic and political life.

NOW is particularly concerned with combating policies and practices of sex-based discrimination in employment. It has participated in numerous cases before Federal and State courts involving employment discrimination issues. NOW has, through its officers, given testimony before Congress on various aspects of the statute in question here, Title VII of the Civil Rights Act of 1964. It is included in Title 41 of the Code of Federal Regulations as one of those organizations to be consulted by employers seeking compliance with executive orders and regulations relating to affirmative action employment programs for Federal contractors.

The issues raised in this case are of great concern to the National Organization for Women and its members, since numerous women, including members in good standing of NOW, are employed by and active in religious organizations and associations. Women have long been recognized as the life-blood of our churches. They compose a significant part of the membership, volunteer workers, employees and contributors of American churches.

OPINIONS BELOW

Opinions of the United States District Court and the United States Court of Appeals for the Fifth Circuit are fully cited in the Brief of Petitioner.

GUIDELINES

Jurisdiction is conferred upon the court by 28 U.S.C. §1254 (1). Petitioner has made a timely petition for certiorari having filed within ninety days of the date on which the Court of Appeals acted on petitioner's timely petition for a rehearing, that date being April 26, 1972 as set forth in the Brief of Petitioner.

REASONS FOR GRANTING THE WRIT

This court should grant certiorari because important Federal issues have been raised in this case and decided by the Court of Appeals. These issues involve significant constitutional questions, interpretation of legislation promulgated to protect minority rights of employment and construction of the doctrine of avoidance of the constitutional question.

The issues raised have not been correctly or finally determined by the Court of Appeals. This court should resolve those questions.

STATISTICS AND CONSTITUTIONAL PROVISIONS INVOLVED

This case involves Title VII of the Civil Rights Act of 1964 (42 U.S.C. §200e, et seq.).

"§702 (s200e-1) *Subchapter not applicable to employment of aliens outside State and individuals for performance of religious and educational activities of religious corporations, associations, or societies and educational institutions.*

"This subchapter shall not apply to an employer with respect to the employment of aliens outside any State, or to a religious corporation, association, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, or society of its religious activities or to an educational institution with respect to the employment of individuals to perform work connected with the educational activities of such institution.

"§703 (§2000e-2.) *Unlawful employment practices—Employer practices.*

(a) It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

§704 (§200e-3.) *Other unlawful employment practices—Discrimination for making charges, testifying, assisting, or participating in enforcement proceedings.*

(a) It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a change, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter."

Pertinent to this case is that part of the First Amendment which provides:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof ***."

QUESTIONS PRESENTED

1. Did the Court of Appeals err in its application and interpretation of the doctrine of *Ashwander* v. *Tennessee Valley Authority,* 297 U.S. 288 (1936) regarding avoidance of constitutional issues when it construed the applicable provisions of Title VII to exclude from its purview the employment relationship between church and minister?

2. Did the Court of Appeals err in its finding that Congress did not intend to include the employment relationship between religious organizations and its ministers?

3. Did Congress exceed its constitutional authority or violate the religious freedom provisions of the First Amendment by enacting §702 of Title VII of the Civil Rights Act of 1964 to provide that religious organizations are not exempt from the prohibitions against employment discrimination on the grounds of race, color, sex, or national origin, including employees who perform ministerial functions?

STATEMENT

The opinions of the courts below establish that the petitioner was commissioned as an officer, a category deemed minister, of the Salvation Army in June, 1967 after a two-year training period at its Officers Training Schoool. Mrs. McClure then served as a Corps Commander, Welfare Casework Supervisor and a secretary.

Her officership was terminated on July 19, 1970, less than a month after she had filed a complaint with the Equal Employment Opportunity Commission (EEOC) alleging that she and other women officers received lower

salaries and fewer benefits than their male counterparts and charging violations of Title VII, §703(a), of the Civil Rights Act of 1964, 42 U.S.C. §2000e-2(a) by the Salvation Army Corporation of the Southern Territory.

The EEOC failed to obtain respondent's compliance and on July 15, 1970, Mrs. McClure commenced this action in the United States District Court for the Northern District of Georgia.

The District Court found that The Salvation Army is a religion, that Mrs. McClure's functions and grievances were matters of religious activity and, therefore, were within the exemptions of 42 U.S.C. §2000e-1.

The Court of Appeals upheld the finding that the Salvation Army is a church and Mrs. McClure a minister, but went on to find that the Army was within the definition of employer and Mrs. McClure an employee as set forth in Title VII, §§42 U.S.C. 2000e (f) (h).

After disposing of these questions, the Court first confronted, then avoided, the constitutional issue of whether the application of Title VII's provisions to the relationship of church and minister violated the Religion Clauses of the First Amendment.

It did so by applying the doctrine of avoidance of constitutional issues as set forth in *Ashwander* v. *Tennessee Valley Authority,* supra, finding that a construction of Title VII was possible so as to avoid the constitutional question. The Court discussed the line of cases defining and protecting free exercise of religion under the First Amendment. Then without discussion of legislative history, the Court decided that Congress did not intend "through the non-specific wording of the applicable pro-provisions of Title VII, to regulate the employment relationship between church and minister".

Petitioner filed a petition for rehearing and the Court of Appeals reversed the District Court's assessment of costs against petitioner, ordering each party to bear its own costs.

Petitioner's permission to proceed *in forma pauperis*, granted at the time action was instituted, was denied, upon her application for a copy of the transcript of the evidentiary hearing, because of a change in financial circumstances. Her motion for leave to appeal *in forma pauperis* was also denied by the District Court and that order was upheld by the Court of Appeals for the Fifth Circuit.

ARGUMENT

I.

The doctrine of avoidance of constitutional questions as set forth in the concurring opinion of Mr. Justice Brandeis in *Ashwander* v. *Tennessee Valley Authority*, supra, and relied upon by the Court of Appeals, has been misconstrued and misapplied by that Court. The lower court seems to disregard the remarks of the Justice when he notes, quoting from *Crowell* v. *Benson*, 285 U.S. 22 (1932), that the doctrine will be followed if another construction of the statute is "fairly possible". The purpose of the doctrine is to avoid holding legislative enactments unconstitutional or ruling on their constitutionality if they can be otherwise construed, provided that construction is consonant with legislative intent. This Court has repeatedly remarked that this doctrine does not warrant a strained, perverted or distorted construction so as to render the statute vague or unclear. *Jay* v. *Boyd*, 351 U.S. 345 (1956), *Scales* v. *United States*, 367 U.S. 211 (1960); and *Aptheker* v. *Secretary of State*, 378 U.S. 500 (1964).

Had the Court of Appeals heeded the warning of this Court in *United States* v. *Sullivan,* 332 U.S. 689, 693 (1948), that:

> "A restrictive interpretation should not be given a statute merely because Congress has chosen to depart from custom or because giving effect to the express language employed by Congress might require a court to face a constitutional question."

it would have dealt head on with the issue of constitutionality and resolved it.

The "plain meaning" of Title VII §702, is clear. The Congress intends to deal with religious organizations in their employee-employer relationships just as it does with other organizations with the exception of religious-based discrimination. There is no exemption of church-minister relationships under Title VII except as they relate to religious orientation *and* religious activities. In other words, religious organizations are *only* exempt from the proscription on religious discrimination in its religious activities.

In all other respects, it is clear that churches and religious organizations are subject to the prohibitions against race, color, sex and national origin discrimination.

The Court of Appeals in reaching its conclusion on Congressional intent failed to review or consider the legislative record of the Civil Rights Act of 1964. That record is extensive. §702 of Title VII, the portion pertinent here, was amended to its final, adopted version in the Senate.

The purpose and scope of that section is clear. Religious organizations were to be exempt only as to those practices relating to the employment of individuals of a particular religion to perform work connected with the employer's religious activities. (See: 110 Cong. Rec.

12722). For example, a Presbyterian church could not be liable for refusal to hire a Mormon choir director; but, it would be liable if it refused to hire a black minister of education if that refusal was based on the person's race and not on any religious doctrine or practice.

There seemed to be no question in the minds of the Senators regarding the meaning of this section. The 1972 Amendments to this section raised a lengthy debate and the Congressional record is replete with discussions of its coverage.[1] The meaning of §702 was very clear to Senator Ervin who objected to the inclusion of ministers and other employees of religious organizations within the purview of Title VII. [2]Senator Williams, an author of the bill argued that:

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1. Sec. 702, s2000e-1, as amended by the Equal Employment Opportunity Act of 1972, now reads as follows:

> "Subchapter not applicable to employment of aliens outside State and individuals for performance of religious and educational activities of religious corporations, associations, or societies and educational institutions".

The amendment now includes all activities of a religious institution and is not restricted to religious activities as was its predecessor. The amendment became effective in 1972, and applies only to charges filed after that date.

2. Senator Ervin's extensive remarks are set forth in 118 Cong. Rec. s928 et seq. and s2061, February 1, 1972 and February 17, 1972. He saw the 1972 Amendments to Sec. 702 as exempting religious organizations from the provisions of the Act "insofar as the right to employ people of any religion they are fit is concerned. That is the only effect of this amendment," (s2061). As noted above, the amendment as to religious institutions was changed only to broaden the religious discrimination exemption to which they were already subject under the 1964 act to all its activities, not only religious activities.

> ". . . it seems appropriate that persons employed by religious corporations and associations should be given equal employment opportunity with persons in comparable positions by secular employers."

He continued that they (religious organizations) should not be allowed to become "instruments of individious and unreasonable discrimination". (118 Cong. Rec. No. 11, S929, February 1, 1972.)

The scope of this limitation as being to religious discrimination only and then only as to religious activities was again emphasized by House sponsor Congressman Erlenborn. (118 Cong. Rec. No. 35, H1862, March 8, 1972.)

Other statements of sponsors in the Senate debate indicate the limitation intended to exempt clergymen from the religious discrimination provisions while in performance of religious services, a very narrow exception. Nowhere does the Congressional intent or plain meaning of the very specific wording of Sec. 702 suggest the interpretation rendered by the court below.

On the contrary, the intent of the legislation is clearly to include the church-minister relationship within its scope except as to the right of the church to discriminate on the basis of religion in its religious activities. Thus, the Court of Appeals erred in its interpretation of the statute. It also erred in failing to resolve the substantial constitutional issue in accordance with the policy laid down by this court.

The policy, as discussed above, was clearly enunciated in *Shapiro* v. *United States,* 335 U.S. 1 (1948):

> "The canon of avoidance of constitutional doubts must, like the "plain meaning" rule, give way when its application would produce a futile result, or an unreasonable result plainly at variance with the policy of the legislation as a whole." (p. 31).

II.

Had the Court of Appeals correctly applied the doctrine of avoidance of the constitutional question it would have finally come to grips with the issue of the constitutionality under the Religious Clauses of the First Amendment of the provisions of Title VII of the Civil Rights Act which include within its purview religious organizations with the exception of religious discrimination.

The court examined this issue, suggested that if it were to rule on the constitutionality, it would find encroachment and then retreated behind a finding Congressional intent. The court's review and suggested conclusion of encroachment have misinterpreted and misapplied the line of cases dealing with the free exercise of religion, and governmental interest.

Particularly the court relied on *Presbyterian Church in the United States* v. *Mary Elizabeth Blue Hull Memorial Presbyterian Church,* 393 U.S. 440 (1969). In that case, the court declined to resolve a controversy involving church property because to do so would involve adjudicating issues of religious doctrine and practice. But the court made it clear that there were controversies involving religious bodies which were within the jurisdiction of civil courts and that the criteria was whether those controversies involved religious teachings. If the dispute does not touch upon purely eccleasiastical matters and presents no danger of impinging on "free development of religious doctrine", it may be within the purview of civil litigation. The court indicated it would take jurisdiction if the property questions could be so structured as to not require inquiring into ecclesiastical matters.

Again in *Gonzalez* v. *Roman Catholic Archbishop,* 280 U.S. the court refused to intervene because "matters purely ecclesiastical" were involved. There the refusal of the church to appoint the aggrieved party to a chaplain position was based on qualifications grounded in canon law. The Court properly refused to allow secular courts to be used to adjudicate canonical law.

The lower court also relied upon *Kedroff* v. *St. Nicholas Cathedral,* 344 U.S. 94 (1952), but even there the refusal to interfere in selection of clergy was because there was no improper method of choice proven. The court suggested that if such were the case it might indeed adjudicate the rights of the parties.

Each of these cases is careful to limit constitutional protection to purely religious matters. Each is distinguishable from the case at bar. Petitioner here does not ask the court to adjudicate basic tenets of faith, canonical questions or ecclesiastical issues. A determination that the relationship between petitioner and respondent is covered by Title VII will not infringe upon religious matters of the Salvation Army.

Free exercise of religion does not mean freedom to violate the civil and constitutional rights of individuals or freedom to disobey laws not relating to religious practice. Yet, the position argued by the respondents would provide religious bodies with that opportunity.

The test laid down in *Sherbert* v. *Verner,* 374 U.S. 398 (1963) was whether the statute in question, although secular in purpose, imposed any incidental burden on the free exercise of religion and, if so, whether there was a compelling state reason to justify that burden. A statute which is primarily secular in purpose and effect, but imposes secondary restraints upon the free exercise of re-

ligion will be held unconstitutional unless Congress advances cogent reasons for its restrictions. The Civil Rights Act of 1964 is clearly secular in its purpose and effect. Congress has acted under constitutional authority to guarantee equal protection in employment consonant with the Fourteenth Amendment and its power to legislate on matters of public welfare and regulate interstate commerce. The primary purpose of Title VII is to provide equal economic and employment opportunity to individuals. The primary effect is upon employers of twenty-five or more persons, most of whom are secular and a few who are religious organizations.

The adoption of Title VII was even urged by numerous religious groups because they saw the need for enforcement of civil rights on secular bodies. Insofar as its provisions relate to religious organizations, it does so tangentially in an effort to bring all employers within its scope. Respondents fail to show that any burden is placed on its exercise of its religious beliefs and practices. It does not contend that its beliefs require or even allow for different treatment of women and men officers. It has not established that its preaching of the gospel, its religious functions or matters pertaining to ministry will be in any way affected by a finding that the relationship of petitioner and respondent here is within the meaning of Title VII. There is no element of coersion or constraint upon free exercise here.

If this legislation be coercive upon First Amendment religious freedoms, then a doubt is cast upon other public interest legislation. This court has long recognized that there are areas of public welfare, safety and interest that justify regulation of or extension to religious organizations. Thus, the churches are subject to the Internal Reve-

nue Code, corporation codes, the Fair Labor Standards Act, and the Occupational Health and Safety Act of 1971, to name a few. The latter two treat religious organizations as employers. Parochial schools have been required to meet state educational requirements. (*Pierce* v. *Society of Sisters,* 268 U.S. 510 (1925). Statutes requiring closing of public places on Saturday and Sunday have been upheld. (*Braunfeld* v. *Brown,* 366 U.S. 599 (1961); *Prince* v. *Commonwealth of Massachusetts,* 321 U.S. 158 (1944); *Gallagher* v. *Crown Kosher Super Market,* 366 U.S. 617 (1961); and *McGowan* v. *Maryland,* 366 U.S. 420 (1961)). State child labor laws have been held to apply to minors distributing religious literature.

Even this court's most recent expression on religious freedom, while upholding the right of Amish parents to withhold their children from required public school attendance as a protection of their religious freedom, still made it very clear that ". . . activities of individuals, even when religiously based, are often subject to regulation by the States in the exercise of their undoubted power to promote the health, safety, and general welfare, of the Federal Government in the exercise of its delegated powers." (*Wisconsin* v. *Yoder,* —— U.S. ——, 92 S. Ct. 1526, 1535 (1972). The impact found so repugnant in *Yoder* was the criminal penalty to which the parents were subjected in "performing acts undeniably at odds with fundamental tenets of their religious beliefs." (at p. 1524.)

In balancing First Amendment guarantees and public interest, it has already been held that where the religious practices and beliefs are so repugnant to the public good or morals, restricting legislation will be upheld. (*Reynolds* v. *United States* 98 U.S. 145 (1971).

Important to note here is that questions of belief and practice are not interfered with. The Salvation Army

agrees that its religious board practices and beliefs do not allow for different treatment of men and women. The controversy here is over matters temporal and it is these matters that have been subject to regulation under other legislation upheld by this court and is the subject of Title VII.

The Congress has a very great interest in obtaining equal employment opportunities for all citizens regardless of race, national origin or sex. That concern is so great that Congress extensively expanded the coverage and enforcement of Title VII. In so doing, it retained the provisions over religious institutions, once again confirming its interest.

Religious organizations, churches and schools employ large numbers of persons. Some of these persons perform partial ministerial duties along with secular or non-ecclesiastical duties. Some, because of the nature of the religious groups with which they are affiliated are designated ministers, officers or practitioners while in other religious organizations they would be considered teachers, secretaries or administrators. To allow the respondent to place petitioner and others similarly situated outside the purview of the statute by designating them as ministers is to subvert the intent of Congress.

Congress clearly did not intend to exclude from coverage persons who performed duties such as those performed by petitioner even when they are deemed by her employer to be ministerial in nature.

What the Salvation Army seeks by the interpretation it urges, is to place itself beyond all legislative restriction even on temporal or secular matters.

Just as Mr. Justice Douglas remarked in *Tilton* v. *Richardson* that "The mounting wealth of the churches makes ironic their incessant demands on the public treasury" (—— U.S. ——, 91 S. Ct. 2091, 2104 (1971), so too it is ironic that respondent whose teachings urge equal treatment of women and men, argues that it should be exempted from the enforcement its secular, less moralistic, counterparts are subject to.

Petitioner, however, is not asking the civil courts to enforce the doctrine of equality enunciated by her church, but that the civil laws pertaining to non-discrimination be enforced insofar as they relate to matters of salary, benefits and employment opportunities. She is not asking, as the candidate-bishop in *Gonzalez*, supra, that canonical law be interpreted or that church doctrine be enforced as in *Presbyterian Church* v. *Hull*, supra.

She is praying that her civil rights to fair and equal employment practices be guaranteed as it is to employees of other organizations. Indeed, if the court holds that regulation of the church-minister relationship to the extent of preventing race, sex and national origin discrimination is restrictive of the First Amendment religious clauses, it will effectively remove thousands of persons from protection of important civil and constitutional rights.

Persons such as Mrs. McClure, who are members of groups that have very broad definitions in categories of ministers, in other words, positions which include specifications far beyond the traditional concept of minister, stand in jeopardy of violation of their own individual religious freedoms. By exercising their free choice to become ministers in their chosen faith, they are forced to relinquish civil and constitutional rights of equal protec-

tion under the laws. In accordance with the lower court conclusions, if Mrs. McClure had performed many of the assigned functions in the employ of many other religious bodies, her employment would not have been designated "minister" and she would be covered under Title VII.

The result is that Mrs. McClure is excluded from benefits of public welfare legislation by reason of her religious beliefs. (See: *Everson* v. *Board of Education,* 330 U.S. 1 (1947).

In holding S. 702 of Title VII of the Civil Rights Act of 1964 as not violative of the religious clause of the First Amendment, this court would be carrying out the intent of Congress and would be deciding consistently with the earlier expressions protecting First Amendment freedoms.

Certiorari should be granted because the Court of Appeals misapplied and misconstrued the doctrine of constitutional avoidance and, therefore failed to resolve important federal and constitutional questions which this court should settle.

CONCLUSION

The petition for a Writ of Certiorari should be granted.

Respectfully submitted,

MARILYN HALL PATEL,
Mills Tower,
220 Bush Street,
San Francisco, California 94104.

Attorney for amicus curiae